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Interests of Amicus Curiae

The Stockbridge-Munsee Community is a federally-recognized Indian tribe. The Community was originally located in north central New York. Its lands were acquired by the State in a number of transactions that were never approved by the federal government. The Tribe has filed a claim to those lands under the Indian Commerce Clause and Indian Nonintercourse Act, 25 U.S.C. § 177 (1983). *Stockbridge-Munsee Community v. State of New York*, No. 86-CV-1140 (N.D.N.Y.). The defendants include the State, state officials, counties, and municipalities. The State and state officials have moved to dismiss the Community's claims based on the Eleventh Amendment.[1]

The Community is interested in the correct application of *Ex Parte Young*, 209 U.S. 123 (1908), to Indian land claims. The Ninth Circuit's decision in *Coeur D'Alene Tribe of Idaho v. State of Idaho*, 42 F.3d 1244 (1994), correctly permits suits against state officials to enjoin ongoing violations of federal law.

Summary of Argument

Federal courts can enjoin violations of federal Indian statutes, such as the Nonintercourse Act, enacted under Congress' Indian Commerce Clause authority.

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[1] Pursuant to Rule 37.3, written consents from counsel of record for the parties have been filed with the Clerk of the Court.

Argument

I. Introduction

The Indian Commerce Clause, art. 1, § 8, cl. 3, states that "Congress shall have the power . . . to regulate commerce . . . with the Indian tribes . . . ." Congress has passed a number of Indian statutes, under the Indian Commerce Clause, regulating a broad range of activities in Indian Country. The earliest and most fundamental of such legislation is the Nonintercourse Act[2] which has been consistently construed by courts to regulate states as well as private individuals in their dealings with Indian lands. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2d Cir. 1980) *cert. den.* 452 U.S. 968 (1981). The Nonintercourse Act provides,

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the

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[2] The Nonintercourse Act was initially passed in 1790, ch. 33, 1 Stat. 137. Congress passed a stronger, more detailed version in 1793. Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; *see also* the Act of May 19, 1796, ch. 30, 1 Stat. 469; the Act of Mar. 3 1799, ch. 46, 1 Stat. 743; the Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; the Act of May 6, 1822, ch. 58, 3 Stat. 682; Act of June 30, 1834, ch. 161, 4 Stat. 729. The Nonintercourse Act is now codified at 25 U.S.C. § 177 (1983).

> Constitution . . . .

25 U.S.C. § 177. The Community has Nonintercourse Act claims against the State of New York which raise Eleventh Amendment issues.

II. Federal Courts Can Compel State Officials to Comply With Federal Law

State officials are not immune from suit when they violate the Constitution. In particular, if they withhold property obtained in violation of the Indian Commerce Clause, the federal courts can act to stop the violation.

One of the weaknesses in the Articles of Confederation was that they did not clearly delineate the division of authority between the states and the Confederal government in Indian affairs. "Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. 1, § 8, cl. 3, that granted Congress the power to regulate trade with the Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. at 234 n.4. Of specific concern was the states' practice of treating with Tribes for land cessions. Clinton and Hotopp, *Judicial Enforcement of the Federal Restraint on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17, 36-37 (1979). The Indian Commerce Clause and the Nonintercourse Act changed that making Indian affairs the "exclusive province" of the federal government and the "extinguishment of Indian title [dependent upon] the consent of the United States."

County of Oneida, 470 U.S. at 234, 240.

The courts consistently acted to enforce those restrictions on alienation. *Id.* at 234-36; *see also Oneida Indian Nation v. County of Oneida*, 414 U.S. at 669-75. Although states were, in large part, the object of the Indian Commerce Clause and the Nonintercourse Act, it is only in recent times that Tribes have sued states and state officials for violations of those laws. *See e.g.*, *Stockbridge-Munsee Community v. State of New York*, No. 86-CV-1140, *above*; *Mohegan Tribe v. Connecticut*, Civ. No. H-77-434 MJB (D. Conn.); *Golden Hill Paugussett Tribe v. Weicker*, No. 2:92CV00738 (PCD) (D. Conn.).

Such suits are not barred by the Eleventh Amendment. Sovereign immunity does not protect state officers when they violate the Constitution and federal statutes. *Ex Parte Young*, 209 U.S. 123. Land acquisitions made in violation of the Indian Commerce Clause and the Nonintercourse Act were "void *ab initio*". *County of Oneida*, 470 U.S. at 245. The acts of state officials in holding land so acquired is an ongoing violation of the Indian Commerce Clause and the Nonintercourse Act. It is just such acts that federal courts can enjoin pursuant to the *Ex Parte Young* doctrine.

The doctrine of *Ex Parte Young* developed in order to give "life to the Supremacy Clause." *Green v. Mansour*, 474 U.S. 64, 68 (1985). The "theory" is that "an unconstitutional statute is void . . . and therefore does not 'impart to [the official] any immunity from responsibility to the supreme authority of the United States.'" *Id.* (Citations

omitted). The *Ex Parte Young* doctrine was foreshadowed by decisions involving real property. In *Tindal v. Wesley*, 167 U.S. 204, 221 (1896), this Court held that the "settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf." *Tindal* relied on the earlier decision in *United States v. Lee*, 106 U.S. 196 (1882).

The "rule of law" set out in *Tindal* and *Lee* was clarified in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) and *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 688 (1982). Those cases made clear that the "Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional." *Id.*, at 689.

The Indian land claim cases fit within the *Ex Parte Young* doctrine as prefigured by *Tindal* and *Lee* and interpreted in *Treasure Salvors*. Where state officers hold land acquired from tribes without federal consent, they are acting in violation of the Indian Commerce Clause and the Nonintercourse Act. The Eleventh Amendment does not protect them in that instance. *Treasure Salvors*, 458 U.S. at 689. Such an ongoing breach of federal law is "precisely the type of continuing violation for which a remedy may permissibly be fashioned under Young." *Papasan v. Allain*, 478 U.S. 265, 282 (1986). Permitting relief against state

officers in these circumstances protects the federal interests embodied in the Indian Commerce Clause and the Nonintercourse Act.

Conclusion

The federal courts have authority to enforce federal Indian statutes against state officials.

Respectfully submitted,

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